

No. 14707.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD E. ROGERS, Doing Business as HOWARD E.
ROGERS Co.,

Appellant,

vs.

GEORGE GARDNER, Trustee in Bankruptcy of the Estate
of HOWARD E. ROGERS, Etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Statement of the Case.

An involuntary petition in bankruptcy was filed against Appellant on December 29, 1952. [Tr. pp. 3-6.]¹ Following reference of the proceeding to Referee in Bankruptcy Benno M. Brink [Tr. p. 7], an order of adjudication was duly entered on January 20, 1953, Appellant making no objection thereto. [Tr. p. 8.]

¹All citations to the record refer to the printed Transcript of Record on file in the Court of Appeals.

On June 30, 1953, Appellee Trustee in Bankruptcy filed Specifications of Objections to Appellant's discharge alleging two grounds: First, an alleged false financial statement, and second, an alleged failure to explain a deficiency of assets. [Tr. pp. 9-12.]²

Trial of the issues thus raised was held on December 11, 1953 before the Referee, who sustained the first specification and denied Appellant's discharge on this ground. Evidence was not offered by the Trustee as to the second specification which was therefore dismissed, and accordingly is no longer material. Findings of Fact, Conclusions of Law and Order Denying Discharge were eventually entered by the Referee on October 21, 1954. [Tr. pp. 12-17.]

Appellant filed a timely Petition for Review of the Order denying his discharge on November 1st. [Tr. pp. 18-20.] Thereafter the matter was briefed and argued before District Judge Ben-Harrison, who adopted the Referee's findings and conclusions and affirmed the order denying discharge by order entered February 18, 1955. [Tr. pp. 21-22.]

This appeal was taken from the order of the District Judge by timely Notice of Appeal filed March 2, 1955. [Tr. pp. 22-23.]

Statement of the Evidence.

Produce Reporter Company is a national mercantile agency which publishes for its subscribers credit information regarding those engaged in the produce business. The

²The Trustee at the time of trial requested leave to file an additional or third specification. [See Tr. pp. 82-83.] But permission to so file was ultimately denied by the Referee.

data is furnished annually in a permanent volume called the "Blue Book"; interim reports are provided for the subscribers in weekly credit sheets. All Produce Reporter Company credit ratings are contained in certain coded symbols placed next to the name of the person or firm reported upon. These symbols may be decoded by means of a key or legend which appears in the front of the book. [Finding II(a), Tr. p. 13.]

The Blue Book published in April, 1952, showed Appellant as having a net worth of \$25,000.00. [Finding II(b), Tr. p. 13.] On or about September 15, 1952, Appellant furnished to Produce Reporter Company the financial statement involved in this case which the Referee found to be false. [Finding II(c), Tr. pp. 13-14.] Thereafter in the weekly credit sheet of October 24, 1952, Appellant was given the rating "(69) (144) XXX (148)," which, when decoded, means: That the previous report on Appellant should be revised to show that there was no definite estimate as to his financial worth; that his reported methods, reputation and credit standing were good; that Produce Reporter Company had conflicting reports with respect to Appellant; and that the new rating indicated *reported general experience* with him. [Finding II(d), Tr. p. 14.]³

In November, 1952, Williams Farms Company, Inc. delivered merchandise to Appellant on credit in reliance

³The Produce Reporter Company assigns the following meanings to these symbols:

"69: Reported previous report should be revised to read—

"144: Reported no definite estimate as to financial worth."

"XXX: Good."

"148: Have conflicting reports—rating indicates reported general experience." [Tr. p. 61.]

upon the foregoing rating. [Finding II(f), Tr. pp. 14-15.] At the time of extending the credit, however, Williams Farms Company, Inc. did not know that Appellant had issued a financial statement, nor did it discover this fact until after his bankruptcy. [Tr. p. 57.]

Statute Involved.

Section 14(c)(3) of the Bankruptcy Act, (11 U. S. C., Sec. 32(c)(3)) provides:

“The Court shall grant the discharge unless satisfied that the bankrupt has . . . (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition;”

Issue Presented.

Can a bankrupt who has issued a false financial statement be denied his discharge under Section 14(c)(3) of the Bankruptcy Act where there is neither evidence nor a finding that any creditor relied upon the statement in extending credit?

Specification of Error.

No creditor relied upon Appellant's financial statement in extending credit to him, and, in the absence of such reliance, there is no basis for denying the discharge under Section 14(c)(3) of the Bankruptcy Act.

Argument.

It is well established that before a discharge can be denied under Section 14(c)(3) of the Bankruptcy Act on the ground that the Bankrupt issued a false financial statement, there must be proof that a creditor extended credit in reliance thereon. Thus, in *Banks v. Siegel*, 181 F. 2d 309, 310 (C. A. 4), the Court stated:

“It is true that a discharge will be granted if there was no reliance upon the false financial statement by the party making the loan.”

In the case of *Matter of Day*, 11 Fed. Supp. 400, 28 A. B. R. (N. S.) 115, the Court said:

“It seems to be settled . . . that it is necessary not only for the creditor to show a false statement in writing respecting the bankrupt’s financial condition, but that the creditor from whom the money was obtained relied upon this statement.”

In *Matter of Kenney*, 43 A. B. R. (N. S.) 242, 244-245, it was held:

“The rule seems to be that in order to deny a discharge where a false financial statement has been given, that the proof must establish not only that the statement given by the bankrupt was false, but also that the creditor relied upon the false statement in extending the credit.

“As the agent of creditor who took the statement and extended the credit has failed to appear in this proceeding, the finding must be that the proof offered is insufficient to sustain the specifications of objections to the discharge of this bankrupt.”

Other cases to the same effect are collected in 1 *Collier on Bankruptcy*, at page 1365, where the Treatise states:

“It was not the intention of Congress to extend clause (3) to all cases of false written statements where credit happens to have been given, but it should be confined to cases where the decision to give credit was induced by the false statement . . . *i.e.*, the lender or seller must to an extent at least have relied upon it.”

In the present case there is no finding, nor is there any evidence in the record to indicate, that Williams Farms Company or any other creditor relied upon Appellant's financial statement, as distinguished from the coded credit rating. On the contrary, at the time Williams Farms Company extended credit to Appellant, it did not know that he had furnished a statement to Produce Reporter Company, and did not discover this fact until after bankruptcy ensued. [Tr. p. 57; see also Tr. p. 50.]⁴

The coded symbols, moreover, give no indication that a financial statement had been issued. The rating on its face shows that it is *not* based on a financial statement, that it does not purport to communicate financial data or Appellant's net worth to any creditor, and that it is based

⁴“Q. When did you first find out that a financial statement had been made by Howard E. Rogers Company to Produce Reporter Company as of July 31, 1952? A. After we had lost a considerable sum of money he owed us.

Q. Was that after the bankruptcy was filed here? A. Yes, it was.

Q. You are sales manager for the company you are with? A. Yes.” [Tr. p. 57.]

only on Appellant's general experience in the trade. [See Tr. pp. 60-62.]

Furthermore, it should be pointed out that Produce Reporter Company employs a special symbol, namely, the number "65", to communicate that a financial statement has been received from a person reported upon. This symbol was not used in appellant's rating. [Tr. p. 50.]

Even Produce Reporter Company refused to believe or rely upon the financial statement in preparing Appellant's rating of October 24th. While this agency, as has been noted, reported a \$25,000 net worth for Appellant in the Blue Book of April, 1952, all reference to net worth was omitted following receipt of the statement in question. This fact prompted the Referee in summarizing the evidence to observe:

"What influence, if any, did [Appellant's financial statement] have on the publisher of the Blue Book in making the revised rating? The statement shows a net worth of \$57,000. The odd thing is that the revised rating eliminates the estimated net worth of \$25,000 which had theretofore been assigned to Mr. Rogers. . . .

"In other words, the Blue Book didn't believe Mr. Rogers' statement." [Tr. pp. 77-78.]

Accordingly, there is no possibility of a causal connection between the financial statement and the rating of October 24, 1952, on the one hand, and the extension of credit by Williams Farms Company in November, 1952, on the other hand.

It should be noted in passing that the Blue Book rating of April, 1952, has no bearing on the issue presented here. In the first place, Williams Farms Company extended the credit in question in November with knowledge that the April, 1952 rating had been superseded by the one of October 24th.

Secondly, there is nothing in the record to indicate that the rating of April, 1952 was not a true report of Appellant's financial condition at that time. Whatever was Appellant's condition in April, 1952, however, a rating accorded him then could not possibly be affected by a financial statement issued in September, approximately five months later.

For these reasons, therefore, the Referee said:

“The Referee: It is quite clear that the Blue Book of 1952 is not material here and we are limited to what he referred to as Quarterly Reports and the statements.” [Tr. pp. 40-41.]

In affirming the Referee, the District Judge seems to have believed that this Court's opinion in *Yates v. Boteler*, 163 F. 2d 953, dispenses with the requirement of creditor reliance upon the financial statement. Appellant submits, however, that the *Yates* case, correctly read, holds only that a creditor's total or partial reliance upon data contained in a false statement issued to a credit reporting agency is a basis of opposition to discharge. There, a creditor did in fact rely upon a statement furnished by the bankrupt to Dun & Bradstreet. This was possible since the credit agency actually transmitted to its sub-

scribers the financial data received.⁵ But in the present case, Produce Reporter Company did not communicate in any manner to any person the information contained in Appellant's statement, with the result that creditors could not rely thereon even partially. Indeed, as has been seen above, the mercantile agency itself did not believe or rely upon the statement here in question.

A situation practically identical with the instant one was before Referee in Bankruptcy Reuben G. Hunt in *Matter of Earline Leota Shedd*, No. 59,358-WB, Southern District of California, affirmed on review without opinion by District Judge William Byrne on January 26, 1955. In the *Shedd* case, a false statement was furnished a credit agency which used it in preparing a coded report on the bankrupt. Creditors subsequently extended credit in reliance on this rating. Referee Hunt held that the discharge must be granted because no creditor relied on the statement as distinguished from the opinion of the mercantile agency embodied in the rating. While Appellant does not suggest that a decision of a Referee in Bankruptcy is in any way binding upon this Court, nevertheless pertinent excerpts from the Certificate on Review

⁵For example, this Court observed in *Yates v. Boteler*, 163 F. 2d at 954:

"Thereafter, Dun & Bradstreet prepared a report containing much information not given by the appellant, but also accurately embodying the figures that he had given to the agency's representative."

And at page 955:

"In his testimony, the appellant admitted that the statement distributed by Dun & Bradstreet contained the same figures that he had given to the agency's representative."

are set forth in Appendix "A" to this brief as being sound in logic and therefore persuasive.

It is submitted that the Court below confused the question of "What action would have been taken by a creditor had Appellant furnished an accurate statement?" with the question of "Was there in fact reliance by a creditor upon a false statement?" The former question calls for mere speculation. The latter is the only material one and must be answered here in the negative.

Conclusion.

For the foregoing reasons, the order appealed from should be reversed.

Respectfully submitted,

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APPENDIX "A".

Pertinent Excerpts From Certificate on Review of Referee Reuben G. Hunt in Matter of Earline Leota Shedd, No. 59358-WB, Southern District of California.

"IV.

"COMMENT OF THE LAW AND THE EVIDENCE.

"A discharge is a legal right, to be denied only if the bankrupt has been guilty of one of the acts which the Bankruptcy Act makes a ground for its denial, and the provisions for discharge are to be interpreted liberally in favor of the bankrupt. *In re Farrow*, SD Cal., 40 ABR, NS, 155, 28 F. S. 9; *Bockus v. Yuen*, CCA, 9, 29 F. (2) 205, 13 ABR, NS, 204; *Johnston v. Johnston*, CCA 4, 22 ABR, NS 340, 63 F (2) 24."

"2. THE STATEMENT WAS NOT FURNISHED TO THE CREDITORS WHO EXTENDED THE CREDIT.

"The creditors who extended the credit never saw the statement in question, nor did they ever see a copy of it. It was never communicated or exhibited to them. All they got was the opinion of the mercantile agency as to the financial rating of the bankrupt's husband. A false statement made to a mercantile agency for general use constitutes a basis for the denial of a discharge in bankruptcy. The agency is the representative of the debtor for the purpose of obtaining credit by means of exhibiting the statement to the creditor. *Yates v. Boteler*, CCA, 9, 163 F. (2) 953. The statement must be communicated by the mercantile agency to the creditor. *In re Muscara*, WD, Pa., 9 ABR, NS, 276, 18 F. (2) 606."

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“4. THE CREDITORS WHO EXTENDED THE CREDIT DID NOT RELY UPON THE STATEMENT.

“This appears obvious since it was not communicated to them, they never saw and never received a copy of it. All they received was a written opinion from the mercantile agency as to the financial rating of the bankrupt’s husband. It is essential that the creditor extending the credit must have relied upon the statement. *In re Leonard*, SD, Ca., 122 F. S. 214; *In re Day*, DC, Mass., 28 ABR, NS, 115, 11 F. S. 400; *In re Stafford*, DC, Conn., 36 ABR, 746, 226 F. 127. It seems plain that the creditors involved here did not rely upon this financial statement, but rather upon the mercantile agency’s opinion of the husband’s financial rating, in extending the credit they did.”